IN THE HIGH COURT OF BOMBAY AT GOA
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WRIT PETITION NO. 278 OF 2003

M/s. Rimula Ore Carriers,
a partnership firm, having
its office at Cazgomfem,
Tembim, Curtorim, Salcete,
Goa, represented herein by
its Partner Mr. Johann
Fernandes, major in age,
businessman, r/o Curtorim,
Salcete, Goa. ... Petitioner

Versus

Shri Shriram S. Malik,
major in age, businessman,
carrying on business with
name Siddharth Ore Carriers,
with office at Roshan Mahal,
2nd Floor, Swatantara Path,
Vasco da Gama, Goa. ... Respondent.

Shri S. D. Lotlikar, Senior Advocate with Shri Zeller D'Souza, advocate for the petitioner.

Shri S. M. Lotlikar, advocate for the respondent.

CORAM : F. I. REBELLO, J.

DATE : 3rd July, 2003.

ORAL JUDGMENT

Rule. Respondent waives service. Heard forthwith.

2. Petitioner aggrieved by the Order dated 18th June, 2003, passed in Appeal filed under Section 17 of the Arbitration and Conciliation Act, 1996, has preferred the present petition.

3. The undisputed facts are that there was an agreement between the petitioner herein and the respondent dated 16th December, 2000. The agreement describes that the

respondent, owner of the barge, was seeking to give the same to the petitioner herein, who is described as a contractor, on bare boat charter basis. One of the Clauses was that the petitioner was to maintain the barge at his own costs, including its accessories. The petitioner was also to inform the respondent about the major repairs/overhauling. The petitioner was to employ his own master, officers and crew members, without any liability of whatsoever nature on the part of the respondent. Apart from that, the insurance was to be paid by the petitioner. Clause 10 provided that in case of damage or destruction all the liability would be saddled on the petitioner. Clause 12 provided for situations when the owner agreed to transfer the barge to the respondent. Clause 13 is the clause under which the respondent had the power to terminate the contract for breach and the respondent could take possession of the barge. The same Clause provided that in the alternative, it was open to the respondent to accept the balance amount of hire charges due alongwith interest at the rate of 21% per annum, on the said amount of hire charges, from the date of termination till effective payment, the above measures being pre-estimated damages. It is not necessary to advert to the other clauses, except that under Clause 18, on the petitioner making full and final payment of hire charges, the owner was duty-bound to transfer the barge in the name of the contractor, petitioner, or his nominee.

It transpires that disputes arose between the parties. In proceedings which came before this Court in Misc. Civil Application No.118 of 2003 in Writ Petition no. 85 of 2003, an order came to be passed in terms of the Consent Terms dated 7th March, 2003. By the said Consent Terms a sole Arbitrator was appointed. It was left to the parties to move the Arbitrator for interim reliefs. The respondent herein applied for interim relief. The petitioner herein filed his reply. The learned Arbitrator considering the case of the parties, by Order of 10th April, 2003, was pleased to grant relief in terms of the Order. The essential features of the order were that the respondent herein was directed to deposit Rs.26,00,000/- of instalments, which were still to be paid, alongwith interest at the rate of 21% for 3 instalments fallen due at the end of October, November and December, 2002, till 8th January, 2003. Consequent on the petitioner's complying with those directions, the respondent was directed to withdraw letters or communications or notices to the Captain of Ports, Deputy Captain of Ports and also letters/notices to the Oriental Insurance Company, to cancel the insurance policy of the said barge and also to withdraw the revocation of the power of attorney. The Order on 2nd May, 2003, before the learned Arbitrator would show that the amount was deposited and consequent thereto the learned Arbitrator passed orders as set out therein.

4. An appeal came to be filed against the said

order. An interim order was passed by the Appellate Court in respect of which the parties moved this Court. This Court pending the hearing of the appeal, passed an order to maintain status quo initially, which was subsequently modified, that the petitioner would remain in possession as a Receiver, till the disposal of the appeal pending before the Appellate Court. The Appellate Court has now passed an order on 18th June, 2003,. By the said Order, the petitioner herein has been directed to hand over possession of the barge to the respondent within seven days from the date of the order, with the directions as set out therein. The petitioner aggrieved by the said order has preferred the present Writ Petition. None of the parties have challenged the maintainability of the present Writ Petition, though a civil revision would be maintainable.

5. At the hearing of this petition, on behalf of the petitioner it is contended that the impugned order is in the nature of mandatory direction and could not have been granted at the stage of interim relief considering that it is the petitioner who is in possession of the barge the crew members have been appointed by petitioner and that the respondent has been secured for the entire amount which was payable under the terms of the contract. It is also contended that the issue whether the contract is determinable or not is an issue which will have to be gone into by the learned Arbitrator. The learned Appellate Court could not

have directed at the interim stage, handing over of possession to the respondent. All the necessary documents for the operation of the barge are with the petitioner and in fact, the petitioner has been operating the barge till date, after the interim order of the learned Arbitrator.

On the other hand, on behalf of the respondent, learned counsel contends that by the very nature of the contract it was determinable and as such specific performance could not have been ordered. In that context it is contended that no injunction could have been granted, nor a decree for specific performance. In these circumstances, it is pointed out that the order of the learned Arbitrator was without jurisdiction. All that the Appellate Court had done is to correct the said order and considering that the petitioner has no right, directed that possession be handed over to the respondent herein. In these circumstances, it is set out that this Court should not interfere with the order of the Appellate Court.

6. I have heard the arguments advanced by the learned counsel. In the first instance, in an application either under Section 9 or Section 17 what has to be considered is protecting the subject-matter of the dispute. The rights of the parties will, ultimately be adjudicated by the learned Arbitrator. It is no doubt true that it is open to the Court or the learned Arbitrator to consider, prima

facie the legal rights of the parties and accordingly mould the relief that can be granted. In the instant case, the learned Arbitrator at an interim stage directed the petitioner to deposit the entire amount, which was the entire balance consideration to be paid to respondent for the sale of the barge which amount has been secured by way of Bank Guarantee, in terms of the contract. On payment being made, the respondent had to convey the title of the barge in favour of the petitioner. The respondent is now secured for the entire amount. The contention however, of the respondent, is that once there is a termination, the contractual terms have come to an end and the petitioner herein has no right whatsoever. It is argued that therefore the question of the petitioner claiming any rights would not arise at all. The agreement contemplates that it is the petitioner herein who would be running the barge on the terms and conditions set out therein. It is the petitioner who had to take the insurance policy, engage employees and also get surveyor's certificate, etc. The petitioner has been doing that. The petitioner before the termination had paid to the respondent over rupees 14 lakhs, apart from the repairs that have been carried out. Respondent's contention has been that inspite of the termination of the contract, the petitioner herein applied for insurance in his own name, suppressing the true facts and got the insurance certificate in his name which he could not have done. For the barge to ply, it is essential that there is survey certificate and that can be obtained

only if, amongst other conditions, the insurance policy is there. The petitioner herein itself wrote to the insurance company and obtained the insurance policy in its own name and further, based upon that, managed to get the survey certificate to enable the barge to ply. In these circumstances it is contended that the vessel should be protected. Once that be the case it is contended that the order should not be interfered with.

7. There are triable disputes between the parties which are open for consideration before the Arbitral Tribunal. The property till such time will have to be protected. The possession of the barge is with the petitioner. The entire balance consideration has been secured. Crew has been engaged by the petitioner. In these circumstances, the order by way of or in the nature of mandatory injunction could not have been granted at the interim stage. This i, therefore, a fit case where it is just and convenient to appoint a Receiver for the barge to protect the interests of both the parties. The impugned Order of the Appellate Court will have to be set aside.

The only question is as to who should be appointed as Receiver of the barge and whether as a Receiver the person so appointed would be entitled to ply the barge till such time as the learned Arbitrator passes the Award. The possession of the barge is with the petitioner. No doubt the

respondent has terminated the contract. The crew was to be appointed and maintenance was to be done by the petitioner. In these circumstances, in my opinion, this is not a case where a third party should be appointed as a Receiver, considering the controversy involved and more so as the entire amount towards the purchase price of the barge has been secured, alongwith with interest on the defaulted amount, before the learned Arbitrator. Therefore, the Receiver in the instant case will have to be the petitioner herein.

The next question is whether it would be open to the Receiver to operate or ply the barge pending the passing of the Award. The contract was terminated by letter dated 2nd December, 2002. To that the petitioner filed a reply on 9th December, 2002. The respondent's attention was drawn to the fact that another company under the control of the respondent was due and owing monies to the petitioner and if the money was not released it may not be possible to pay the instalment of October, 2002. In other words, the respondent and/or the sister company of the respondent were holding monies which the petitioner company was entitled to. The insurance policy has thereafter been taken by the petitioner. The petitioner pursuant to the order of the learned Arbitrator dated 2nd May, 2003, has been plying the barge though between the interregnum 1st March, 2003 to 2nd May, 2003, the barge was not in operation. It may further be noted that the entire

consideration has been secured. In these circumstances, if the petitioner is allowed to ply the barge as Receiver, it will be open to the Arbitral Tribunal, if it ultimately comes to the conclusion that the contract was properly terminated, to award to the respondent herein damages from the amounts already secured and lying with the learned Arbitrator. In these circumstances and as even after the termination the petitioner continued to run the barge and after 2nd May, 2003, has also been running the barge, it will be fit and proper, that the petitioner, who is appointed as Receiver is allowed to run the barge, subject to the petitioner filing an undertaking before this Court, in respect of the insurance policy already taken, that the insurance policy would be held by the petitioner in its capacity as Receiver of this Court and if any money is realised from the insurance policy it will be as Receiver, and will be accounted for till such time as the award is passed with a further undertaking that in case of any other liability which may arise on account of any act of plying the barge as otherwise it will be the petitioner who will be solely liable and would indemnify the respondent to that extent.

8. In the light of that the following Order:-

The impugned Order of the Appellate Court is set aside. Instead, the petitioner is appointed as Receiver of the suit barge. The petitioner as Receiver to ply the suit

barge, subject to what has been set out above, including filing the undertaking which has to be filed in this Court within ten days from today.

The Bank Guarantee which has been deposited before the Arbitral Tribunal will be retained by the learned Arbitrator. The Bank drafts to be renewed by the petitioner, before fifteen days of the expiry of the Bank drafts, on failure the learned Arbitrator to encash the same. It will be open to the learned Arbitrator to taken steps after hearing the parties to open a Bank account and deposit the drafts in an account so that the said money is available for the benefit of the parties who ultimately succeed before the learned Arbitrator.

Rule made partly absolute accordingly.

F. I. REBELLO, J.

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